In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE PORTSMOUTH HOTEL, ETC., COMPANY ET AL. v. THE UNITED STATES. } No. 381.

ON APPEAL FROM THE COURT OF CLAIMS.

MEMORANDUM SUBMITTED BY THE UNITED STATES.

Under leave obtained, the United States submits this memorandum respecting the contention advanced by counsel for appellant upon oral argument that certain acts of entry upon claimants' land, not covered by findings of the Court of Claims, show a taking of that land by the United States.

1. There is no mention whatever of the subject matter referred to by counsel—

(*a*) In the petition, which relies solely upon the training and firing of the guns at Fort Foster. (R. 8.)

(*b*) In any request for findings of fact addressed to the Court of Claims at any time *either prior or subsequent* to its announcement of its decision.

(*c*) In any finding by the Court of Claims, or in its opinion.

(*d*) *In the motion filed in this court to remand.*

(*e*) In appellants' brief in this court.

2. The testimony read to the court appears on pages 430–431 of the printed transcript of the evidence filed below. It had already appeared (transcript, 49, 50) that in 1906 the Government had sought permission of claimant Jennison to do something on his land in the way of establishing fire-control stations for Fort Constitution (not Fort Foster, the battery here) and that upon claimants' refusal the project had been wholly given up.

Inspection of the present testimony shows that the acts referred to occurred in April and in September of 1917, long after the petition herein, which was not sought to be amended, was filed and *after the declaration by this country of war upon Germany*. Exactly what is claimed by Jennison to have been done was to open a clogged up drain, to run an electric cable across the land to certain points and to erect a small hut out of odds and ends of lumber. It is also complained that soldiers entered the abandoned hotel but if so there is absolutely no showing that it was done by the authority of the United States. The hut was about 10 feet square. (Transcript, 432.)

The testimony read was disputed in certain respects. (Testimony W. T. Goodale, transcript, 441, 442.) And it appeared that what was done was done under color of express permits given to the United States by the Saco & Biddeford Savings Institution (transcript, 440, 450), understood by the United States to be the record holder of the title to the land

upon which the acts which related primarily to the location of searchlights and an observing station were done. The transcript (pp. 444, 450) contains the documents under which the savings institution as foreclosing mortgagee and as the owner of a tax title, was thought by the United States to own the property upon which the acts were done. The permits suggest what the testimony of Maj. Hase (421–429) and the character of the acts themselves also indicate, that the matter was an entirely temporary incident of the conduct of the war, although no doubt some observation station in the locality might be desirable as a matter of permanent instalation.

Presumably the Court of Claims, if it deemed the matter brought properly to its attention or thought it material concluded that the United States was right in its assertion that the acts were done under express permission of the person owning the property at the time in question. And this apart from the fact that the acts were done in war.

In any event, it is submitted that it is going very far to assert a taking of this whole property upon the basis of these trifling invasions of unoccupied premises. And that the question was not properly before the Court of Claims or before this court.

In view of certain questions asked at the argument and of the difficulties of deciphering the chart placed in the record, the United States has filed with the clerk of this court two prints of a photograph which was defendant's Exhibit 1 in the court below. They show the guns in the position in which

they were in 1914 and 1915. The flag which was erected to mark the limit of claimants' land (but in fact was placed some yards too far inland) appears at the place where it was erected. The position of Whalesback Lighthouse, the facing of the battery, the zone of fire available to the fort without passing over claimants' land are all clearly indicated thereby.

At the request of counsel for appellants, there is filed also the testimony, read by him to the court for such assistance if any, as it may afford.

LaRue Brown,
Assistant Attorney General.

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